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AAR revises Seller's Property Disclosure Statement

by K. Michelle Lind

The Arizona Association of Realtors (AAR) Residential Seller's Property Disclosure Statement (SPDS) Work Group, chaired by Trudy Moore, recently completed the revision of the SPDS form. The new SPDS is available now from AAR. A sample copy is available from the Department's web site at www.re.state.az.us/toc.html.

The SPDS has been expanded from three pages to six, although notably, some of the additional length is due to the increase in font size. Because the questions were reformulated to ask only for information of which the seller is aware, the "unknown" box has been eliminated. Additionally, many specific disclosure issues are now listed on the form, and additional information is provided to assist the seller in making all required disclosures and the buyer in obtaining all desired information. This article highlights some of the important revisions to the SPDS.

Message and Instruction to the Seller

The message to the seller explains that sellers are obligated by law to disclose all known material (important) facts about the property and the SPDS is designed to assist in making these disclosures.

Sellers are instructed to complete the form by answering all questions as truthfully and as fully as possible, to attach any available supporting documentation, and to use the explanation lines as necessary. If the seller does not have the personal knowledge to answer a question, the seller is instructed to use the explanation lines to explain.

Message and Instruction to the Buyer

The message to the buyer explains that

although sellers are obligated to disclose all known (important) facts about the property, that there are likely facts about the property of which the seller is unaware. Therefore, the buyer is told of the importance of taking an active role in obtaining information about the property.

The buyer is instructed to review the SPDS and any attachments carefully and to verify all important information. The buyer is also instructed to ask about any incomplete or inadequate responses and inquire about any concerns not addressed on the SPDS. Finally, the buyer is instructed to review all other applicable documents, such as the CC&R's and the title report, obtain professional inspections of the property, and investigate the area surrounding the property.

Ownership and Property

This section prompts for a variety of general information about the property, such as location, ownership and occupancy. Any seller, whether or not that seller has actually lived in the property, should be able to answer most, if not all, the questions in this section.

The SPDS informs the parties that an Affidavit of Disclosure is required by law if the property is in an unincorporated area and five or fewer parcels of land, other than subdivided land, are being transferred. Additionally, the parties are advised that if the owner is a foreign person or non-resident alien, a tax advisor should be consulted about possible mandatory FIRPTA withholding of funds. If the property was built prior to 1978, the parties are informed that a lead-based paint disclosure is required.

Building and Safety Information

This section provides for information

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Couple collects \$11,475 from recovery fund

A court order was entered on November 15, 2001, in Maricopa County Superior Court awarding \$11,475 to Bert and Shirlee Wells for losses sustained in a transaction with real estate salesperson Bob Jenkins.

In August 1998, Jenkins offered to purchase Wells' Phoenix home for \$80,000, which included \$700 earnest money deposit, \$12,000 for sellers' total equity, and \$68,000 "subject to existing VA wrap." Jenkins' offer required that he pay the \$12,000 in four equal, quarterly installments with the final payment due at close of escrow in September 1999. Jenkins was also to make payments of \$700 on possession and monthly for the next eleven months. The offer disclosed Jenkins' licensed status.

Mr. & Mrs. Wells' made a counteroffer that required a pre-possession agreement. Jenkins accepted the counteroffer and executed a pre-possession agreement on August 23, 1998. He also gave Wells his check for the \$700 earnest money deposit.

The bank returned Jenkins' check for insufficient funds, so Jenkins gave Mrs. Wells \$550 in cash and a bank check for \$850 to cover the August and September payments. When Jenkins defaulted on the November payment, Wells canceled escrow on the sale. In the meantime, the Wells were in default on their mortgage on the property because of Jenkins' failure to make his required payments, and the lien holder

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Visit the Department's web site at
www.re.state.az.us
where you'll find a wealth of
information of interest to
real estate professionals
and consumers.

Five bills introduced to change real estate statutes

House Bills 2005, 2006, 2007 and 2008, introduced in the current legislative session, would effect several changes to real estate statutes.

Here is a brief summary of those changes:

A.R.S. § 32-2124(J)

Qualifications of licensees

Language added to set a five year time limit within which an applicant applying for an exam waiver of the national portion of the Arizona exam shall have taken the national portion of the exam in another state.

A.R.S. § 32-2135(B)

Real estate schools; courses of study; instructors; certification

Language providing that a licensee file a copy of continuing education certificates with a renewal application instead of attaching a list of continuing education classes on a separate sheet of paper and removing the requirement for licensees to retain their certificates.

A.R.S. § 32-2136(C)

Broker management clinic

Language cleanup providing that before a broker becomes a designated broker they must attend a broker management clinic unless they have attended a broker management clinic within the preceding twenty-three months instead of during the broker's current licensing period.

A.R.S. § 32-2153(A)(B)&(E)

Grounds for denial, suspension or revocation of licenses; issuance of a provisional license; retention of jurisdiction by commissioner; definition

Language added which provides the commissioner with the authority to issue a letter of concern to a licensee

when a statute or rule has been violated. Definition added for "letter of concern," which is a proposed non-disciplinary advisory letter for use when a licensee violates a statute or rule in this chapter. The proposed language for "letter of concern" is taken from BOMEX statutes.

Definition added to define "incompetence" for the purpose of supporting agency action, pursuant to A.R.S. §32-2153(B)(8).

Subdivision Statutes

A.R.S. § 32-2181.02(B)(2)

Exempt Sales (Subsequent owner exemption)

Language added to clarify that prior public reports used for subsequent owner exemptions may only be two years old.

A.R.S. § 32-2181.02(F)

Exempt Sales

To clarify the penalty for wrongful use of an exemption.

A.R.S. § 32-2181.03

Lot reservations

Restricts the taking of lot reservations in only developments located within Arizona. Provides for a 2-year time limit for taking lot reservations.

A.R.S. § 32-2186 through 32-2193.02

Recovery Fund

The Recovery Fund statutes are proposed to be amended to provide that applications for payment from the Fund are filed with the Commissioner, rather than with the courts.

Applicants whose claims are denied will have an opportunity to appeal to the courts, as will licensees before a claim is paid if the licensee believes the applicant's claim does not qualify for payment from the Fund.

The courts will also hear and determine proration proceedings

initiated by the Department when it appears that claims will exceed the maximum amount available from the Fund.

Additionally this amendment will cover claims against inactive licensees.

Disclosure Statutes

House Bill 2174, introduced by Rep. Steve May, would amend A.R.S. § 32-2156 to create additional disclosure requirements:

"In a real estate sales contract a seller of real property or a licensee shall disclose in writing to the buyer the number of times in the previous three years the property was treated for household pests or wood-destroying pests or organisms as defined in section 32-2301. The buyer shall acknowledge in writing the receipt of the disclosure before the buyer signs the real estate sales contract. If the property was treated on a periodic basis, the seller or licensee shall disclose the frequency of the treatments and, if the treatments were substantially similar, shall provide a summary of the categorical information required by paragraphs 1 through 5 of this subsection. If the property was treated for termites, if there were treatments done on a nonperiodic basis or if the treatments were done on a periodic basis but were not substantially similar, the disclosure shall include for each treatment:

1. The type of treatment used.
2. The target organism.
3. The chemical used, if applicable.
4. The strength of the chemical used as represented by the percentage of active ingredient, if applicable.
5. The amount of chemical used, if applicable.

D. For the purposes of this section, 'periodic basis' includes monthly, bi-monthly and quarterly."

Rental property must be registered with assessor

A.R.S. § 33-1902 requires the owner of Residential rental property to register the property with the appropriate county assessor. Failure to do so can result in a civil penalty of \$1,000 plus \$100 for each month after the date of the original violation until compliance occurs.

Some rental property owners intentionally fail to register the property because

doing so may increase property taxes. Real estate agents should inform property management clients of the requirement.

What information must the property owner furnish the county assessor?

1. The name, address and telephone number of the property owner.
2. If the property is owned by a corporation, limited liability company, partnership,

limited partnership, trust or real estate investment trust, the name, address and telephone number of the statutory agent, if applicable, and of the following:

- a. For a corporation, a corporate officer;
- b. For a partnership, a general partner;
- c. For a limited liability company, the managing or administrative member;

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Jerry Holt

News From The Commissioner

Department survives first leg of Sunset Legislation

Every 10 years, the Legislature must decide whether to disband the Arizona Department of Real Estate or keep it in business for another 10 years.

I'm pleased to tell you that House Bill 2007, which extends the life of the Department until July 1, 2012, has passed the House and has been sent to the Senate where it undoubtedly will be approved.

The bill states that "Pursuant to section 41-2955, subsection B, Arizona Revised Statutes, the legislature continues the state real estate department to protect the public health, safety and welfare by regulating the sale of real estate and through the administration of the real estate recovery fund."

Disclosure Instructor Development Workshop

Disclosure of all sorts of information about real property offered for sale is becoming an increasingly complex matter. This is evidenced by the Arizona Association of Realtors decision to significantly overhaul its Seller's Property Disclosure Statement and by court decisions such as that described in the article titled "Seller Beware" which begins on page 12 of this issue.

Recognizing the need for adequate continuing education in the area of disclosure, the Department, in cooperation with the Arizona Real Estate Educators Association, will present two Instructor Development Workshops (IDW) on the subject of "disclosure" on March 1 and April 5 at the Arizona School of Real Estate and Business, 7142 E. 1st Street, in Scottsdale.

Every approved real estate in-

structor who teaches a course that includes significant disclosure content must attend a workshop. Virtually every agency, contract law, real estate legal issues and Commissioner's Standards course includes such content.

Registration begins at 8 a.m. The workshops will begin at 9 a.m. and end at 4 p.m. The \$40 registration fee includes a catered lunch.

We are deeply indebted to attorneys K. Michelle Lind, J. Robert Eckley and Richard V. Mack who will present the IDWs. In my opinion, these are really brilliant people and none better could have been selected. Our thanks goes also to the members of the committee who developed the course outline for the workshops, especially Arizona Real Estate Educators Association president Ed Ricketts. According to Mr. Ricketts, the IDW will provide a comprehensive review of salient disclosure issues, case law and examples. Each IDW is limited to 150 participants registered on a first-come, first-served basis.

For more information and to register you may contact Mr. Ricketts at ejretal@fastq.com or you may reach him by telephone at 602-277-4332.

The idea of presenting these IDWs was given to me by Mike Moloney following a Real Estate Educators Association meeting I attended nearly a year ago. (The best ideas always seem to come during the hallway talk. Thanks, Mike.) Since then, the prestigious committee was formed and probably 10 two- to three-hour meetings were held to develop the curriculum, etc. Mere words cannot adequately express my gratitude to the members of this committee whose dedication and unselfish service to their

industry is so very admirable. In addition to those mentioned above, certainly Bill Gray deserves the highest praise along with ADRE staffers Judy Kisselburg, Roy Tanney and Cindy Wilkinson, and educators Tom Fannin, Martha VanDer Werf, David Compton, Cole Greenberg, Howard Weiner, Mark Hayden, Michael Woolf, Craig Yelverton, Terry Zajac and Stu Bernstein. Thanks folks; you're all aces!

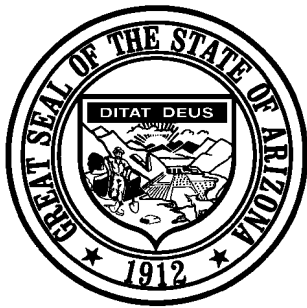
Homeowners association regulation disclosure

As you undoubtedly know, homeowners associations (HOAs) are not regulated by anyone. Repeated attempts to pass legislation giving one state agency or another the responsibility for regulating HOAs have failed.

Many homeowners purchasing homes in a subdivision regulated by a homeowners association do not realize this, and may believe they can turn to some state agency or other regulatory entity when they encounter a serious problem with the association to which they belong. In fact, other than attending meetings of the Board of Directors and using all their powers of persuasion to get their way, about their only recourse is to hire an attorney to deal with the association.

Is this a material fact that should be disclosed to a prospective buyer? You bet it is. Are licensees making this disclosure? Probably very few are. Don't run the risk of being sued; disclose this fact to all potential buyers when the property falls within the jurisdiction of a homeowners association.

Hope to see you at the Prescott Arizona Association of Realtors meeting in March. I'll be on a panel and no holds will be barred.



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Portions of your license file are not a matter of public record, but most of it is

Occasionally we receive a request from a licensee to not disclose the licensee's home address. A.R.S. 32-3801 states, "Notwithstanding any law to the contrary, a professional's residential address and residential telephone number or numbers maintained by a professional board ... are not available to the public unless they are the only address and numbers of record."

This means that the Department cannot reveal the home address and telephone number of a licensee whose license is active. Instead, we can reveal only the business address and telephone number.

However, the only "address and numbers of record" for inactive licensees are the person's home address and telephone number. We are required by law to disclose these to anyone who requests them. For instance, anyone may purchase a list of inactive licensee names, addresses and telephone numbers from the Department.

The contents of licensing and *closed* investigative files are also a matter of public record but there is certain information the Department does not disclose: bank account numbers, the licensee's social security number and date of birth, and any information received from the F.B.I. as a result of a criminal records check. This information is redacted before the file is made public.

Your next license will have a new look

Until recently, Arizona real estate licenses were pre-printed on heavy stock in two colors, imprinted with license information, then mailed in a specially designed envelope.

Now, licenses will be generated entirely by a computer and ink-jet printer on plain copy paper and mailed in a standard window envelope. In line with the Governor's mandate to cut our budget, this change will effect a significant reduction in the cost of printing and mailing more than 41,000 licenses each year.

**The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.**

ADMINISTRATIVE ACTIONS

REVOCATIONS

01A-032

**Joseph Francis Bonelli, Jr.
Ash Fork**

DATE OF ORDER: November 28, 2001

FINDINGS OF FACT: In his October 2000 application for renewal of his real estate salesperson's license, Respondent disclosed a 1992 Massachusetts conviction for possession of marijuana, and a September 1995 misdemeanor conviction in Massachusetts for Threatening to Commit a Crime.

Subsequent to receiving his license, Respondent also disclosed an October 2000 conviction for Theft, Possession of Stolen Property, a class 6 undesignated felony. Respondent remains on probation under the supervision of the Coconino County Superior Court Adult Probation Department.

VIOLATIONS: Respondent was convicted of the crime of theft; the conduct giving rise to that conviction was conduct that constitutes dishonest dealings in violation of A.R.S. § 32-2153(B)(2) and (B)(10). Respondent is not a person of honesty, truthfulness and good character, a violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's real estate salesperson's license is revoked.

01A-066

**W. Darlene Long and E.C.I. Realty, Inc.
Bullhead City**

DATE OF ORDER: December 12, 2001

FINDINGS OF FACT: At all times material to this matter, Long was doing business as E.C.I. Realty, Inc. ECI was issued a real estate broker's license by the Department.

The Department received a number of complaints against Respondents regarding the failure to perform the duties of a property manager pursuant to property management agreements.

ECI made representations to its clients for whom it managed properties that rental checks were mailed or were being mailed to the clients when that was not accurate.

The Department attempted to conduct an audit of ECI's records on May 10 and 11, 2001 and presented Long with a subpoena requesting certain financial records, including ECI's bank account statements. On May 10, the auditors observed stacks of files and documents scattered throughout ECI's office. On that date, Long told the auditor she was unable to provide any of the requested documents.

The auditors informed Long that they would return the following day, affording her a further opportunity to supply the requested documents. In particular, the auditors sought ECI's trust account records and business records for four ECI clients who had filed complaints with the Department.

On May 11, the auditors returned to ECI. Long provided them with a partial file for three of the clients, and said she could not locate the fourth file.

Long told one auditor that she had unopened mail at the office dating back to 1999 and that some of the mail might contain checks.

She indicated that she had suffered from ill health and that her daughter, Sandee Bartee had been running ECI's business. Long admitted that ECI's trust account had not been reconciled in two years and that the account was short of funds in the approximate amount of \$35,000.

On June 21, 2001, the Department summarily suspended Long's real estate broker's license. On July 18, Long appealed the suspension, resulting in an administrative hearing.

At the hearing, six ECI clients testified to various violations of real estate statutes, and the failure of Long to remit rent monies and security deposits. In a conversation with one client, Long admitted that rental income had been used for her personal and business reasons.

VIOLATIONS: Respondent's conduct show they have disregarded or violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20 and the Commissioner's Rules in violation of A.R.S. § 32-2153(A)(3). Respondent's conduct established that they failed within a reasonable time to account for or to remit any monies, or surrender to the rightful owner any documents or other valuable property coming into Respondent's possession which belonged to others, in violation of A.R.S. § 32-2153(A)(9).

Respondent did not keep an escrow or trust account or other record of funds deposited with them relating to a real estate transaction, in violation of A.R.S. § 32-2153(A)(15). Respondents commingled money or other property of clients with Respondent's own money or converted the money or property to Respondents or another, in violation of A.R.S. § 32-2153(A)(16).

Respondents failed to produce client records or ECI trust account records on demand by the Department in violation of A.R.S. § 32-2153(A)(17). Respondents failed to maintain complete records of each transaction, in violation of A.R.S. § 32-2153(A)(18).

Long failed to exercise reasonable supervision over the activities of associate brokers or others under her employ, or failed to exercise reasonable supervision and control over activities for which a license is required of a corporation for which she acted as designated broker pursuant to A.R.S. § 32-2125, in violation of A.R.S. § 32-2153(A)(21). Long was negligent in performing acts for which a license is required, in violation of A.R.S. § 32-2153(A)(22). Respondents made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(3).

Respondents made false promises of a character likely to influence, persuade, or induce, in violation of A.R.S. § 32-2153(B)(4). Evidence established Long's incompetence to perform any duty or requirement of a license under or arising from Arizona Revised Statutes, Title 32, Chapter 20, in violation of A.R.S. § 32-2153(B)(8).

Long is not a person of honesty, truthfulness or good character, within the meaning of A.R.S. § 32-2153(B)(7). Respondents failed to provide, immediately on termination of property management agreements, all originals or other copies of all rental agreements or related

documents, and failed to provide owners with a final account of the property's financial status as required by A.R.S. § 32-2173(B) and (C).

Respondents failed to maintain owner's monies in a property management trust account, in violation of A.R.S. § 32-2174. Respondents failed to maintain property management records in accordance with the requirements of A.R.S. § 32-2175. Respondents failed to make available to the Commissioner's representatives all records relative to property management accounts as required by A.R.S. § 32-2175(H). Long breached her fiduciary duty to clients to protect and promote their best interest as required by A.A.C. R4-28-1101(A). Respondents failed to expeditiously perform all acts resulting from an agreement authorized by the holding of a license, as required by A.A.C. R4-28-1101(C).

DISPOSITION: The real estate broker's license of W. Darlene Long and the entity license of E.C.I. Realty, Inc., are revoked.

01A-017

**William Edward Harris
Tucson**

DATE OF ORDER: December 14, 2001

FINDINGS OF FACT: Several complaints were filed against Respondent regarding his activities as a property manager. Although Respondent failed to appear at the hearing, the Administrative Law Judge accepted evidence from the Department that Respondent:

- a. Pursued a course of misrepresentation or made false promises in that he represented to a client that he would collect and remit rental payments to her, and failed to do so, in violation of A.R.S. § 32-2153(A)(1).
- b. Respondent was paid commissions from the rental income he collected from a client which shows he accepted compensation as a licensee for performance of real estate duties from a person other than the licensed broker for whom Respondent worked, in violation of A.R.S. § 32-2153(A)(7).
- c. Respondent failed within a reasonable time to account for or to remit any monies that come into his possession belonging to a client, in violation of A.R.S. § 32-2153(A)(89).
- d. Respondent received compensation or commission in violation of A.R.S. § 32-2153(A)(10).
- e. Respondent commingled money of his client with his own, or converted that money to himself or another, in violation of A.R.S. § 32-2153(A)(16).
- f. Respondent made material misrepresentations, in violation of A.R.S. § 32-2153(B)(3).
- g. Respondent is not a person of honesty, truthfulness or good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondents real estate salesperson's license is revoked. Respondent to pay a civil penalty in the amount of \$4,000.

LICENSE APPLICATION DENIED

01A-065

Lowell Taylor aka Jim Taylor

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Higley

DATE OF ORDER: December 14, 2001

FINDINGS OF FACT: In his May 23, 2001 application for a real estate salesperson's license, Petitioner disclosed that the Arizona Corporation Commission entered an Order to Cease and desist, Order of Disgorgement, Order for Administrative Penalties entered against him for the offer and sale of unregistered securities. The orders grew out of Petitioner's involvement with an entity known as Plus More Trust located in Phoenix. Petitioner sold investment opportunities to investors in the form of loan contracts. According to the consent order entered into by Petitioner, investors were asked to invest money for a period of 12 months and were promised returns of between 3 to 10 percent per month.

Thirty-three investors invested an amount of at least \$1,091,500 in the program. Plus More Trust was not able to make good on its promise to return the investment amounts or interest on those amounts. As the 12-month contracts matured, investors were told that the funds were being retrieved from Europe or that they were being held in New York. Other investors were told that an officer of Plus More Trust was on his way across the country paying investors as he went. In fact, none of these stories was true. By August 1998, Plus More Trust had closed and ceased returning phone calls.

According to the consent order, Petitioner was a managing director, trustee and salesman for Plus More Trust. Petitioner was not registered under the Securities Act as a securities dealer or salesman.

As a result of the consent order, Petitioner was ordered to pay an administrative penalty in the amount of \$28,150, \$1,000 to be paid upon entry of the order and \$300 per month until paid in full. The original \$1,000 was paid on October 26, 1999. Petitioner made payments of \$300 per month until May 2000. He has made no payments since then.

VIOLATIONS: Petitioner made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(2). He failed to show he is a person of honesty, truthfulness and good character, a violation of A.R.S. § 32-2153(B)(7). Petitioner has violated any state law, regulation or rule that relates to real estate or securities or that involve dishonest dealings, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: Petitioner's application for a real estate salesperson's license is denied.

01A-090

Jackie J. Merrill aka Jackie M. Cunningham Tucson

DATE OF ORDER: December 19, 2001

FINDINGS OF FACT: The Department notified Petitioner that it intended to deny her application for a real estate salesperson's license and set a date and time for an administrative hearing. Petitioner did not appear at the hearing.

DISPOSITION: License application denied.

RENEWALS GRANTED

01A-063

Todd L. Hochstedler

Mesa

DATE OF ORDER: December 3, 2001

FINDINGS OF FACT: in his April 30, 2001 application for renewal of his real estate salesperson's license, Petitioner disclosed that he had been convicted of two misdemeanor charges of DUI. The first conviction was entered on December 6, 2000 as the result of a plea agreement. The second was entered on February 5, 2001 after Petitioner was found guilty at a trial.

In addition, Petitioner was earlier convicted of reckless driving after being stopped for a DUI in 1992. In 1995, Petitioner was also convicted of DUI. Petitioner apparently has two DUI convictions from the State of Michigan that occurred in the late 1980s.

Presently, Petitioner is on probation for the December 2000 conviction until December 6, 2001. He is on probation for the February 5 conviction until February 5, 2006. As part of the probation terms, Petitioner was ordered to complete alcohol counseling. He has successfully completed this part of his probation, having completed 36 hours of alcohol treatment between December 2000 and June 2001. He has also completed an Alcoholics Anonymous program where he attended 15 classes, one per week, from February to April, 2001. He has also completed an additional class of Alcoholics Anonymous in August 2001. Finally, Petitioner attended and successfully completed a Mothers Against Drunk Driving impact panel. To this end, he has undertaken steps to become a presenter for MADD at various impact panels to impress upon other impact panel attendee the adverse affect that drunk driving can have on one's career.

The Administrative Law Judge noted in his Findings of Fact that character witnesses convinced him that Petitioner had "truly turned over a new leaf" The judge added, "It is obvious that Petitioner has taken full responsibility for his actions and indeed has taken a new direction in his life with regard to drinking and driving. The evidence demonstrates that Petitioner has rehabilitated himself."

VIOLATIONS: The Administrative Law Judge found that "Petitioner has in the very recent past allowed himself in his private affairs to succumb to the effects of alcohol abuse. The Department has not demonstrated in this matter, however, that the salutary purposes behind A.R.S. § 32-2153 would be served by a complete denial of the renewal of the license in this matter.

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status until further ordered by the Department:

A. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

B. Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

C. Prior to the issuance of the provision sales li-

cense, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, as well as the quality of his services and client relationships. The practice monitor shall report any behavior or conduct that violates real estate statutes or rules.

E. Prior to issuance of the license, Petitioner shall submit to the Compliance Officer, for pre-approval, the name of a person selected to function as a sobriety monitor. The monitor shall agree in writing to the selection and its attendant responsibilities.

F. Petitioner shall enter into a contract with the sobriety monitor for his attendance at AA meetings with a minimum attendance of two meetings per week.

G. Petitioner shall attend 15 hours of approved continuing classes in the categories of Commissioner's Standards, Agency Law, Contract Law, Fair Housing Issues and Real Estate Legal Issues.

Petitioner is assessed a civil penalty in the amount of \$2,000 payable upon entry of this order.

CONSENT ORDERS

01A-142

Scott Sean Walski Chandler

DATE OF ORDER: December 26, 2001

FINDINGS OF FACT: In his October 2, 2001 application for a real estate salesperson's license, Petitioner disclosed seven alcohol-related convictions.

In March 1998 he was convicted in Chandler Municipal Court of A Minor in Possession and Consuming Alcohol, a class 1 misdemeanor. In June 1998, Petitioner was convicted of Underage Operation of a Vehicle with a BAC of 0.069, a class 1 misdemeanor.

In June 1999, he was convicted of A Minor in Possession of Alcohol, a class 1 misdemeanor. In October 1999, he was convicted of Underage Possession and Consumption of Alcohol, a class 1 misdemeanor.

In March 2000, he was convicted of Minor in Possession of Alcohol, a class 1 misdemeanor. In January 2000, he was convicted of False ID to Obtain Liquor, a class 1 misdemeanor. In February 2001, Petitioner was convicted of DUI.

Petitioner voluntarily attended and successfully completed a recovery program at Spencer Recovery Centers, Inc., on August 2, 2001.

VIOLATIONS: Petitioner has failed to demonstrate that he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status until further ordered by the Department:

A. Petitioner shall abstain completely from the

use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

B. Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

C. Prior to the issuance of the provisional sales license, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, as well as the quality of his services and client relationships. The practice monitor shall report any behavior or conduct that violates real estate statutes or rules.

E. Prior to issuance of the license, Petitioner shall submit to the Compliance Officer, for pre-approval, the name of a person selected to function as a sobriety monitor. The monitor shall agree in writing to the selection and its attendant responsibilities.

F. Petitioner shall be responsible for reporting any breach of the sobriety contract to the Compliance Officer and may be periodically called upon by the Compliance Officer to report on Petitioner's attendance at such meetings and his behavior or activities.

99A-145

In the matter of the subdivision violations of: William G. Anastopoulos; the Estate of Carter D. Wertheim; Gus Dussias; George S. Petropoulos; Arc Development Group, L.L.C., an Arizona Limited Liability Company; The City Group, Ltd., an Arizona Corporation; Peyton Taylor Realty, L.L.C., an Arizona Limited Liability Company, fkm Arizona Real Estate Club; Retrac Fundings Group, L.L.C., an Arizona Limited Liability Co.

Tucson

DATE OF ORDER: November 15, 2001

FINDINGS OF FACT: William G. Anastopoulos is and was at all material times a licensed real estate person in Arizona. His real estate salesperson's license expires on October 31, 2001. Also, Anastopoulos was at all material times a managing member of Arc Development Group, L.L.C. and Peyton Taylor Realty, L.L.C., and Officer and director of Peyton Taylor Homes, Inc., and president/CEO and statutory agent for The City Group, Ltd.

Carter D. Wertheim was at all material times a managing member of Arc Development, Retrac Funding Group, L.L.C., and Peyton Taylor Realty, and an officer and director of Peyton Taylor Homes, Inc.

Gus Dussias is an individual residing in Illinois.

George Petropoulos is an individual residing in Arizona.

Arc Development Group, L.L.C., is an Arizona limited liability company with its principal office located in Tucson. Anastopoulos and Wertheim are its managing members.

The City Group, Ltd., is an Arizona limited liability company with its principal office located in Tucson. Peyton Taylor Realty is a licensed

real estate broker in Arizona, and its license will expire on February 28, 2002. Prior to February 23, 1999, Peyton Taylor Realty was known as Arizona Real Estate Club, L.L.C. Anastopoulos and Wertheim are and were at all material times Peyton Taylor Realty's managing members.

Peyton Taylor Homes, Inc. is an Arizona corporation with its principal office located in Tucson. Its officers and directors include, and included at all material times, Anastopoulos and Wertheim.

Retrac Funding Group, L.L.C., is an Arizona limited liability company located in Tucson. Wertheim was at all material times its managing member.

Between May and December of 1998, Respondents acted individually and/or in concert to subdivide and sell lands located in Arizona, in violation of the Subdivided Lands Act, A.R.S. § 32-2181 et seq., County Planning and Zoning Statutes, A.R.S. § 11-801 et seq., and the Groundwater Code, A.R.S. § 45-401 et seq.

Acquisition of 11 acre parcel in Pima County, Arizona

In May 1998, Arrow Land Survey, at the direction of Arc Development through Anastopoulos and/or Wertheim, surveyed an 11-acre parcel located in Pima County into five lots; three 1-acre lots (parcels 1, 2, and 3) and two 4-acre lots (parcels 4 and 5). The survey included a 30-foot ingress, egress and utility easement between parcels 4 and 5.

In May 1998, Arc Development, Petropoulos and Dussias obtained funds to purchase the 11 acres.

On June 26, 1998, Arc Development closed on the purchase of the 11 acres from the Nelson Family Trust for \$339,000. Toward the purchase price, Dussias contributed \$38,701.78; Petropoulos contributed \$48,701.78; and the City Group and Retrac contributed \$241,596.44. An earnest money deposit in the amount of \$10,000 was paid by check from "Peyton Taylor/Arc Development."

On June 26, 1998, Arc Development recorded five deeds of trust concerning the 11 acres. Three of the deeds of trust secured the amount of \$165,000 against parcels 1, 2 and 3, in favor of The City Group; one deed of trust secured the amount of \$94,000 against parcel 4, in favor of The City Group; and one deed of trust secured the amount of \$104,000 against parcel 5 in favor of Retrac.

On June 26, 1998, upon closing its purchase of the 11 acres, Arc Development conveyed parcel 4 to Petropoulos and parcel 5 to Dussias.

On June 26, 1998, Petropoulos executed a promissory note secured by deed of trust on parcel 4 in favor of Arc Development in the amount of \$94,000. The deed of trust provided for partial deed releases for one-acre lots. Petropoulos agreed to a subordination provision under which the original \$94,000 note between Arc Development and The City Group remained in first position.

On June 26, 1998, Dussias executed a promissory note secured by deed of trust on parcel 5 in favor of Arc Development in the amount of \$104,000. The deed of trust provided for par-

tial deed releases for one-acre lots. Dussias agreed to a subordination provision under which the original \$104,000 note between Arc Development and Retrac Funding remained in first position.

The promissory notes executed by Petropoulos and Dussias each required monthly payments of interest only, with a balloon payment due at the end of one year.

Parcels 1, 2 and 3

Between November 13, 1998 and December 24, 1998, Arc Development conveyed parcels 1, 2 and 3 to Peyton Taylor Homes. Peyton Taylor Homes built a house on each of these parcels.

On November 13, 1998, Peyton Taylor Homes conveyed parcel 3 to Richard P. Garcia.

On December 24, 1998, Peyton Taylor Homes conveyed parcel 1 to Henry C. Boynton, III, and on November 30, 1998, conveyed parcel 2 to Gregory S. Barber. Peyton Taylor Realty acted as agent for Boynton and collected a commission.

Parcel 4

On July 12, 1998, at Petropoulos' direction, Arrow Land Survey surveyed parcel 4 into four one-acre lots.

On July 17, 1998, Petropoulos conveyed parcel 4 to Lisa Encinas, a straw person, who then conveyed parcel 4 back to Petropoulos in four separate one-acre lots (Petropoulos' Lots A, B, C & D). Encinas notarized the deed for Lots A, B, C & D.

Peyton Taylor Homes built a house on Petropoulos' Lot A. On June 11, 1999, Petropoulos conveyed Lot A to James D. Kiel. Peyton Taylor Realty acted as agent for Kiel and collected a commission.

Parcel 5

On November 30, 1998, Dussias executed deeds whereby he conveyed parcel 5 to Encinas, a straw person, who conveyed it back to Dussias as four separate one-acre lots (Dussias Lots A, B, C & D) via four separate deeds. Those deeds were not recorded until December 9, 1998.

On June 24, 1998, also prior to close of Arc Development's purchase of the 11 acres and its subsequent conveyance of parcel 5 to Dussias, Arrow Land Survey, at the direction of Dussias, surveyed Parcel 4 into four one-acre lots.

Peyton Taylor Homes built houses on Dussias' Lots A and B.

On July 23, 1999, Dussias conveyed Dussias' Lot A to Michael W. Chambers. On August 17, 1999, he conveyed Dussias' Lot B to John S. Lewis.

Respondents' actions described above have divided the 11 acres into 11 one-acre lots. The Commissioner has not issued a public report to Respondents approving the sale or lease of lots, parcels or fractional interests in the 11 acres.

The Commissioner has not exempted the 11 acres from the requirements of A.R.S. §§ 32-2181 and 32-2183.

Pima County has not approved, nor have Respondents applied for, a subdivision plat for

Continued on page 8

Continued from page 7

the 11 acres under A.R.S. § 11-801 *et seq.*

The 11 acres is situated within a groundwater active management area within the meaning of A.R.S. §§ 45-402(2) and 45-576. The Arizona Department of Water Resources has not issued, nor have Respondents applied for or obtained a certificate of assured water supply under A.R.S. § 45-576.

As an aggravating circumstance, on October 17, 2000, the Arizona Registrar of Contractors revoked Peyton Taylor Homes' contractor's license for failing to respond to a citation and complaint, in violation of A.R.S. § 32-1152.

Respondents are remorseful regarding their above-referenced conduct. They have been cooperative in reaching a resolution of this matter. On September 27, 2001, Respondents applied to Pima County for a waiver of the subdivision plat requirement.

VIOLATIONS: The division of the 11 acres into six or more lots created a subdivision within the meaning of A.R.S. § 32-2101(54). Respondents acted as subdividers by causing land to be subdivided into a subdivision for themselves and/or for others, and/or by undertaking to develop a subdivision, and/or by participating in transactions which caused land to be subdivided into a subdivision within the meaning of A.R.S. § 32-2101(53).

Respondents acted in concert to attempt to avoid the provisions of Arizona's subdivision laws by splitting the 11 acres and/or selling lots located therein by using a series of owners and conveyances that resulted in a subdivision, in violation of A.R.S. § 32-2181(D).

Respondents conveyed or offered to sell lots or parcels in a subdivision without first obtaining a public report, and failed to furnish each prospective purchase with a copy of a valid public report, in violation of A.R.S. § 32-2183(F).

Respondents failed to notify the Commissioner in writing of their intention to offer for sale or sell the subdivision lots, in violation of A.R.S. § 32-2181(A).

Respondents did not apply for or receive any exemption from the requirements of A.R.S. §§ 32-2181 and 32-2183. Respondents sold subdivided lands without applying for or obtaining a subdivision plat from Pima County, in violation of A.R.S. § 11-801 *et seq.*, and county subdivision regulations promulgated under those statutes.

Anastopoulos has assisted a subdivider or subdividers, or agent or agents thereof, in the offer or sale of a subdivision lot or parcel, or lots or parcels, in violation of the Subdivided Lands Act under circumstances where he knew or should have known of such violations, in violation of A.R.S. § 32-2181 *et seq.*

Anastopoulos disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20 and/or Commissioner's Rules, in violation of A.R.S. § 32-2153(A)(3).

DISPOSITION: Respondents shall cease and desist from selling or conveying lots, or any fractional interests, in the 11 acres until Respondents demonstrate compliance in full with this Consent Order and comply with all applicable subdivision laws or rules and any additional orders.

Respondents The Estate of Carter D. Wertheim, Gus Dussias, George S. Petropoulos, Arc Development Group, The City Group, Peyton Taylor Realty, Retracting Funding Group jointly and severally are each assessed a civil penalty in the amount of \$1,000, a total penalty of \$7,000.

Anastopoulos is assessed a civil penalty in the amount of \$5,000. He is prohibited from applying for renewal of his real estate salesperson's license until October 1, 2002.

Respondents shall bring the subdivided lots into compliance with Pima County subdivision standards and meet requirements for plat approval and recordation, including acquiring and dedicating easements, paying for engineering of roads and building sites, and meeting road construction, water and utility requirements under Pima County Code and A.R.S. §§ 11-806.01 and 32-2181.

Respondents shall provide financial assurance satisfactory to Pima County to complete all required improvements, including engineering and roads, to county standards within 60 days of the date of this order.

Respondents upon entry of this Consent Order, shall offer rescission to each and all individuals or entities who purchased a lot or lots from Respondents in the 11 acres.

Respondents shall obtain and submit to the Department's Compliance Officer, within one year of the date of this order, a written statement by the Pima County Planning Director that they have complied with county subdivision requirements, including applicable floodplain regulations and road engineering and construction standards, with respect to the 11 acres.

Respondents shall obtain a certificate of assured water supply from the Arizona Department of Water Resources under A.R.S. § 45-576, with respect to the 11 acres. Certification shall be obtained no later than one year of the date of this Order.

Respondents shall cease and desist from further violations of the subdivision laws of this state, with respect to any and all interests in land owned or acquired by any of the Respondents.

Future sales by Respondents of any lot or lots, or any fractional interests in the 11 acres or adjacent land shall be subject to the public report requirements of A.R.S. § 32-2181 *et seq.* Should Respondents in the future sell or offer for sale any lot, lots or interests within the 11 acres or adjacent land, Respondent shall apply for and obtain a public report and otherwise comply with the provisions of A.R.S. § 32-2181 *et seq.* before making such offers or sales.

Respondents, jointly and severally, shall reimburse the Department for its investigative expenses in the amount of \$500.

**01A-015
Dave Pardon
Phoenix**

DATE OF ORDER: December 14, 2001
FINDINGS OF FACT: Respondent resides in Arizona and does not hold a real estate license in Arizona. The Department has investigated certain acts of Respondent as they pertain to certain

lots within Grand Canyon Subdivision (the Development) located near Valle just south of the Grand Canyon in Coconino County.

In November 1999, Respondent acquired 35 lots within Units 4, 6, 8, 9 and 12 of the Development through a Coconino County tax sale. In Units 6 and 8, Respondent acquired, offered for sale and sold six or more lots without obtaining a public report.

Respondent still owns two of the lots in Unit 8. Respondent placed advertisements through two Internet services identifying locations and dimension of six or more lots within the Development which he was offering for sale. Respondent states that buyers placed bids on the properties which sold for approximately \$1,100 to \$3,000 each.

Upon notification from the Department, Respondent immediately and voluntarily discontinued all sales in the Development.

VIOLATIONS: Respondent, by his actions, is a "developer" within the meaning of A.R.S. § 32-2101(21). Respondent's sales were not exempt from the public report requirements pursuant to A.R.S. § 32-2181.01 or .02. Respondent failed to notify the Commissioner in writing of his intention to offer for sale or sell the lots in the Development in violations of A.R.S. § 32-2181(A).

Respondent sold or offered for sale subdivided lots in the Development without first obtaining a public report from the Commissioner, and failed to furnish each prospective purchaser with a copy thereof, in violation of A.R.S. § 32-2183(A) and (F).

DISPOSITION: Respondent shall cease and desist from selling or offering for sale any lots in the Development until he demonstrates compliance in full with this Order and complies with all applicable Arizona subdivided land laws and rules.

He shall comply with the subdivision requirements of the state of Arizona and obtain a public report, when applicable, before offering lots in the Development for sale.

He shall provide each purchaser with a copy of the Public Report, and shall receive a receipt.

He shall offer rescission to each of the purchasers to whom he sold lots.

Respondent is assessed a civil penalty in the amount of \$1,000. Respondent shall attend nine hours of approved continuing education classes in the categories of Commissioner's Rules and Real Estate Legal Issues focusing on subdivision law.

**01A-111
Irene C. Martin
Mesa**

DATE OF ORDER: December 14, 2001
FINDINGS OF FACT: In her August 2001 application for a real estate salesperson's license, Petitioner disclosed two 1995 convictions for drug offenses and the Department's denial of her prior application for a real estate salesperson's license in August 1999.

In August 1995, Petitioner was convicted of Possession of Dangerous Drugs, a class 4 felony. In August 1995 she was convicted of Possession of Marijuana, a class 6 undesignated

offense.

The convictions occurred more than six years ago and three years have passed since Petitioner completed her probation and substance abuse counseling.

Petitioner's prior application in August 1999 for a real estate salesperson's license was denied by the Commissioner. She has been employed for the past four years as a nail technician in Mesa. She has represented to the Department that she has no subsequent convictions since August 1995.

VIOLATIONS: Petitioner has been convicted of a felony in violation of A.R.S. § 32-2153(B)(2). **DISPOSITION:** The commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status:

A. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

B. Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

C. Prior to the issuance of the provisional sales license, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, as well as the quality of his services and client relationships. The practice monitor shall report any behavior or conduct that violates real estate statutes or rules.

01A-138

**Paul Bernard Anderson
Chandler**

DATE OF ORDER: December 26, 2001

FINDINGS OF FACT: In his September 24, 2002 application for a real estate salesperson's license, Petitioner disclosed a 1994 convictions for Possession With Intent to Distribute Less Than 50 Kilograms of Marijuana, and Aiding and Abetting, both felonies.

The incident is seven years old, and the Department has no reason to believe that Petitioner has had any criminal convictions or any other civil or administrative judgments entered against him since 1994. Petitioner is self employed and has been licensed by the Arizona State Board of Cosmetology for the past seven years.

VIOLATIONS: Petitioner has been convicted of a felony, in violation of A.R.S. § 32-2153(B)(2). He has failed to demonstrate that he is a person of honesty, truthfulness and good character, within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The commissioner shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status:

A. Petitioner shall abstain completely from the

use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

B. Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

C. Prior to the issuance of the provision sales license, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, as well as the quality of his services and client relationships. The practice monitor shall report any behavior or conduct that violates real estate statutes or rules.

01A-140

**Christopher J. Bridgemen
Wittman**

DATE OF ORDER: December 26, 2001

FINDINGS OF FACT: In his September 2001 application for a real estate salesperson's license, Petitioner disclosed three convictions. In August 1995, Petitioner was convicted of Driving on a Suspended License. In December 1996, Petitioner was convicted of Carrying a Deadly Weapon Without a Permit, a class 1 misdemeanor. In September 2001, Petitioner was convicted of Disorderly Conduct, a class 1 misdemeanor.

VIOLATIONS: Petitioner has failed to demonstrate that he is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: The commissioner shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status:

A. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

B. Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

C. Prior to the issuance of the provisional sales license, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, as well as the quality of his services and client relationships. The practice monitor shall report any behavior or conduct that violates real estate statutes or rules.

01A-152

**Aaron John Harris
Phoenix**

DATE OF ORDER: January 14, 2002

FINDINGS OF FACT: In His October 2001 appli-

cation for a real estate salesperson's license, Petitioner disclosed a 1998 conviction in Iowa for OWI (Operating a Motor Vehicle While Under the Influence of an Alcoholic Beverage or Drug), a serious misdemeanor, and a 1999 conviction in Iowa for possession of marijuana, an aggravated misdemeanor.

After an administrative hearing, the judge wrote in his Findings of Fact that "Petitioner appeared sincerely remorseful, regretted his decisions that resulted in the above convictions, and has accepted responsibility for his actions."

"Harris has a current driver's license, is newly married, and is attending the University of Phoenix."

VIOLATIONS: Petitioner failed to demonstrate that he is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Consent Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status:

A. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

B. Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

C. Prior to the issuance of the provisional sales license, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, as well as the quality of his services and client relationships. The practice monitor shall report any behavior or conduct that violates real estate statutes or rules.

01A-131

**Allen D. Lucken
Flagstaff**

DATE OF ORDER: January 28, 2002

FINDINGS OF FACT: In his February 2000 application for a real estate salesperson's license, Respondent disclosed a 1998 DUI conviction.

Based on Respondent's disclosure, the Department issued him a real estate salesperson's license. Subsequently, the Department learned that Respondent failed to disclose the following criminal convictions in California: drinking in public (1971); failure to provide (1976); NSF check (1977); and drug paraphernalia (1982).

VIOLATIONS: As a result of his failure to disclose the four convictions, he has procured or attempted to procure a license by filing an original application which is false or misleading in violation of A.R.S. § 32-2153(B)(1). His conduct does not show that he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's real estate salesperson's license is revoked.

Seller disclosure

Continued from page 1

regarding the structural integrity of the property. A notice to the buyer to contact a professional to verify the condition of the roof was added to the form as a result of numerous claims from buyers alleging an undisclosed defective roof.

Additional questions regarding wood infestation were added to the SPDS. The seller is asked about any past or current presence of termites or other wood destroying organisms on the property. The treatment history of the property is requested, along with the name of any treatment provider and any warranty information. The buyer is also notified to contact the Structural Pest Control Commission for past reports or treatment history concerning the property.

Heating, cooling, plumbing, and electrical information is requested on the form. The seller is prompted to disclose any swimming pool, spa, hot tub, sauna or other water feature on the property and any problems with any of these items, as well as whether they are heated, and if so, the type of heat.

The seller is also asked specifically to disclose any knowledge of scorpions, rabid animals, bee swarms, rodents, owls or reptiles ever having been present on the property. This question was necessitated by numerous lawsuits, primarily involving the alleged non-disclosure of the presence of scorpions on the property. Although most sellers will answer affirmatively to the question, the buyer will be unable to claim ignorance of these natural inhabitants of our desert environment after close of escrow.

Finally, this section prompts for information about any work or improvements to the property, whether permits were obtained, and other miscellaneous items.

Utilities

The seller is asked whether the property currently receives the listed utilities, and if so, to name the provider. The water source and any known information about drinking water problems are also requested.

Environmental Information

A variety of environmental information is requested. For example, the seller is prompted to disclose any issues relating to: soil settlement/expansion,

drainage/grade, erosion or open mine shafts/tunnels or wells, noise from the surrounding area including airports and traffic noise, any odors or other nuisances. The seller is asked to disclose any past or present asbestos, radon, lead-based paint, pesticides, underground storage tanks or fuel/chemical storage on the property. If the property is located within a Superfund, WQARF, CERCLA or wetlands area, that information is required as well.

One subject that has been added to the form is the issue of mold. Mold spores are everywhere and when mold spores drop in places where there is excessive moisture or where there has been flooding, mold will grow. The seller is asked specifically if the seller is aware of any past or present mold growth on the property. Additionally, the seller is prompted to disclose any conditions conducive to mold growth, such as dampness/moisture, flooding, water damage or water leaks of any kind. If mold is an issue, the Arizona Department of Health Services has an excellent brochure, Indoor Air Quality Info Sheet, Mold in My Home: What do I do? that provides a wealth of information on the subject, which can be provided to the buyer and seller. The brochure and other good resources on mold may be obtained from aaronline.com.

Sewer/Waste Water Treatment

The topic of sewer or wastewater treatment has been expanded as a result of numerous claims and lawsuits filed involving alleged misrepresentations that the property was connected to a sewer, when in fact it was not. The seller is asked if the entire property is connected to a sewer and if so, whether the sewer connection has been verified by a professional. Additionally, the buyer is advised to contact a professional to conduct a sewer verification test. If the property is served by an on-site wastewater treatment facility, i.e., a septic or alternative wastewater system, a variety of additional information is elicited. The parties are also notified that the Arizona Department of Environmental Quality will require a pre-transfer inspection of on-site wastewater treatment facilities on resale properties.

Other Conditions and Factors; Additional Explanations

These blank lines provide space for the seller to disclose any other important

information concerning the property that might affect the buyer's decision making process, the value of the property, or its use. The additional explanation lines can be used for any other necessary explanations.

Seller Certification

The seller's signature certifies that the information in the SPDS is true and complete and that the seller will disclose any changes in the information in writing prior to close of escrow. A box has been added to allow the seller to indicate by initialing that the SPDS has been reviewed and updated as of a specified date.

Buyer's Acknowledgement

The buyer acknowledges by signing that the information contained in the SPDS is based only on the seller's actual knowledge and is not a warranty. The buyer also acknowledges the obligation to investigate any material (important) facts in regard to the property. The buyer is encouraged to obtain professional inspections and to consider a home warranty. A notice has also been added to the SPDS form to advise the buyer that sellers and brokers are not obligated to disclose certain information, such as the fact that the property has been the site of a death or felony, owned or occupied by a person with HIV/AIDS or located in the vicinity of a sex offender. Finally, if the buyer reasonably disapproves of any items contained in the SPDS, the buyer must deliver written notice of the items disapproved as provided in the contract.

Conclusion

The SPDS should be utilized in every residential transaction. (See "Every Buyer is Entitled to an SPDS" on page 11.) The SPDS was revised to assist the seller in making the legally required disclosures and avoid inadvertent nondisclosures of material facts. The SPDS will also assist the buyer in the inspection and investigation of the property. The proper use of the SPDS will result in well informed buyers and reduce liability claims against sellers and the brokers involved in the transaction.

K. Michelle Lind is the Arizona Association of Realtors' General Counsel.

Every buyer is entitled to an SPDS

by K. Michelle Lind

Every buyer should receive a Seller's Property Disclosure Statement ("SPDS"). The revised AAR Residential Resale Real Estate Purchase Contract form (5/00) (the "Contract") recognizes the importance of the SPDS and provides at lines 141-142:

Seller Property Disclosure Statement ("SPDS"): Seller shall deliver the SPDS to the Buyer within five (5) days after acceptance of the Contract.

Thus, pursuant to the Contract, the seller is required to provide a SPDS in every transaction.

Some sellers are reluctant to provide a SPDS. However, where a seller of real property knows of facts materially affecting the value of the property that are not readily observable and are not known to the buyer, the seller is under a duty to disclose those facts to the buyer. *Hill v. Jones*, 151 Ariz. 81, 725 P.2d 1115 (App. 1986). Additionally, pursuant to the Contract, the seller is obligated to disclose all known material latent defects that materially and adversely affect the consideration to be paid by the buyer. The SPDS will evidence the fact that the seller has made these required disclosures.

Sometimes a seller will initially refuse to complete a SPDS on the basis that the seller has never occupied the property, or perhaps has never even seen the property. However, if the seller owns the property, the seller should be able to answer most of the questions in the "Ownership and Property" section of the AAR SPDS. For example, even an institutional seller who has never seen the property can:

- Disclose the address of the property (line 3)
- Disclose whether the property is located in an unincorporated area (line 4)
- Identify the legal owner of the property (line 6)
- Disclose whether the legal owner is a foreign person or non-resident alien pursuant to the Foreign Investment in Real Property Tax Act (lines 7-8)
- Indicate whether the property is in a community providing housing for older persons pursuant to the fair housing laws (line 9)
- Indicate whether the property is owner-occupied, lease, estate foreclosure, or vacant (line 12)
- Indicate if the property is vacant, and for how long (line 12)
- Indicate if the property is rented, and the expiration of the rental agreement, and disclose whether refundable deposits or prepaid rents are being held (lines 13-14)
- Disclose whether the owner has entered into any agreement to transfer an interest in the property in any way (lines 16-17)

Additionally, most sellers know whether the property is in a homeowner's association ("HOA") and whether there are HOA fees (lines 18-20). Arizona law mandates seller disclosure of these and other HOA issues in HOAs with less than 50 units. The seller may also be aware of assessments, litigation, or liens affecting the property. (lines 21-27)

Most of the questions on the SPDS ask only for information of which the

seller is aware. However, if there are questions on the SPDS for which the seller does not know the answers, the seller can simply use the explanation lines to explain. The fact that certain information is unknown by the seller, and why, can be important to the buyer.

Despite the forgoing, some sellers still refuse to provide a SPDS. If a listing states that a SPDS is not available, or will not be provided, a buyer's broker should nonetheless advise the buyer to request the SPDS in the offer. The seller can respond to the offer requesting a SPDS with a counter-offer that a SPDS will not be provided. However, before the buyer accepts the counter-offer indicating that a SPDS will not be provided, a buyer's broker should provide the buyer with a blank copy of the SPDS form, which will enable the buyer to make an informed decision regarding whether to waive the SPDS. In these circumstances, a buyer's broker would be wise to obtain the buyer's written acknowledgment of receipt of the blank form.

A buyer should never waive a SPDS without seeing the SPDS form. Even a blank SPDS is valuable to the buyer. The buyer can and should utilize a blank SPDS as a checklist in conducting the desired inspections and investigations. The SPDS can prompt questions that will assist the buyer in evaluating the property.

Clearly, the SPDS is a valuable tool for both buyers and sellers in a real property transaction. Therefore, every buyer should receive a SPDS.

K. Michelle Lind is the Arizona Association of Realtors' General Counsel

2002 Brownfields Conference to be held April 30 in Phoenix

The Phoenix Brownfields 2002 Conference will be held April 30, 2002 at the Phoenix Civic Plaza, 225 E. Adams.

The conference will be hosted by the Arizona Department of Environmental Quality's (ADEQ) Voluntary Remediation Program and the city of Phoenix's Office of Environmental Programs' Brownfields Land Recycling Program

This event will bring together information, experience and research to

give attendees more knowledge and a greater ability to revitalize our city by cleaning up and redeveloping contaminated sites.

For further information contact Ren Willis-Frances, ADEQ, at (602) 207-4109 or Rosanne Sanchez, City of Phoenix, at (602) 256-5669.

For more information about the Brownfields Land Recycling Program, visit the City of Phoenix web site at <http://www.ci.phoenix.az.us/BROWFLD/brownfld.html>

Rental property

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- d. For a limited partnership, a general partner;
- e. For a trust, a trustee;
- f. For a real estate investment trust, a general partner or officer.

Residential property shall not be occupied if the information above is not on file with the county assessor. Existing leases are exempt from the requirement. If a person receives a complaint alleging failure to comply with any of the requirements above and does comply within 10 days of receiving the complaint, the court shall dismiss the complaint and shall not impose a civil penalty.

Recovery fund

Continued from page 1

sued the Wells. Wells filed an answer and third party complaint against Jenkins. Judgment was entered against Jenkins on the third party complaint on August 16, 1999, for the principal amount of \$17,324.04, including \$5,000 punitive damages, and attorney's fees and costs.

The Wells also filed a forcible entry and detainer action against Jenkins in January 1999 because Jenkins refused to vacate the property or allow other real estate agents to show the home on behalf of Wells. Judgment was entered against Jenkins on February 11, 1999, for damages and to evict him.

The Wells could not collect either of their judgments from Jenkins and in September 2001, filed an application for payment from the Recovery Fund in both lawsuits. Wells later agreed to withdraw the application they filed in the forcible entry and detainer lawsuit.

The Department determined that Jenkins had been guilty of fraud or misrepresentation in the transaction, and agreed to pay the Wells their out-of-pocket losses awarded in the August 1999 judgment. The punitive damages and some incidental expenses claimed on

the application were not recoverable from the Fund. Payment from the Recovery Fund resulted in the termination of Jenkins' license on November 15, 2001. (Case No. CV98-92506, *Wells vs. Jenkins, et al.*)

In an unrelated disciplinary matter in April 1986, a Consent Order was entered whereby Jenkins was ordered to pay a \$350 civil penalty. Jenkins wrote a check to the Department in partial payment of the civil penalty and the check bounced. Because Jenkins failed to pay the penalty, his license was summarily suspended on September 2, 1986. It was reinstated after he paid the penalty in full.

A Superior Court decision denying an application for payment from the Recovery Fund filed by Paul and Flo Jones in July of 2000 was affirmed on September 27, 2001, by the Court of Appeals in Case No. 1CA-CIV020046 (*Jones v. Rego, et al.*).

The Department opposed Jones' claim on the merits because it was based on tenant-caused damages, vandalism or normal wear and tear. In addition, Jones did not notify the Department at the time they filed their lawsuit, as required by A.R.S. §32-2186. Superior Court Judge Alan Kamin denied the ap-

plication, and Jones subsequently appealed to the Arizona Court of Appeals.

In its Memorandum Decision, the Court of Appeals upheld the lower court on two grounds: First, the court held that the untimely notice barred the claim. Second, the court reasoned that the Recovery Fund did not cover the claim in question because the loss was caused by leaking water or tenant damage and not by a licensee acting as such.

A memorandum decision cannot be cited as authority in court, but its reasoning and legal references are nonetheless important to potential claimants and their attorneys, and will generally be followed by the Department.

The Arizona Real Estate Recovery Fund was established for the benefit of anyone aggrieved by any act, representation, transaction or conduct of a licensed real estate or cemetery broker or salesperson that violates real estate statutes or rules. A.R.S. § 32-2186. The fund's liability is limited to \$30,000 for each transaction, regardless of the number of persons aggrieved or the number of licensees or parcels of real estate involved, and no more than \$90,000 for each licensee.

Seller Beware: No safe harbor in selling 'as-is'

by Andrew D. Schorr

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Sellers of commercial real estate, their brokers and attorneys may be quite surprised by the holding in a recent Arizona Court of Appeals case. In *S Development Company v. Pima Capital Management Co.* (1 CA-CV 00-0347, 8/30/01) decided by Division 1, the court upheld a jury verdict of almost \$3.7 million against the sellers of two Phoenix apartment complexes who had failed to disclose to the buyers the existence of defective plumbing in the buildings.

Tort liability possible

The fact that the real estate contracts contained typical "as is"/disclaimer of warranties clauses and inspection contingencies provided no safe harbor to the sellers. The court held that, notwithstanding the existence of an as-is clause or disclaimer of warranties in the contract, a seller of commercial property is subject to tort liability for nondisclosure if he fails to disclose to the buyer latent defects in the property that are

known to the seller or if the buyer is precluded by the seller from discovering "facts basic to the transaction." The sellers' counsel has sought review to the Arizona Supreme Court.

The case arose out of the sale of the two complexes in 1993. Both purchase contracts contained typical as-is clauses and disclaimers of warranties providing, among other things, that:

- except as expressly set forth in the contracts, the sellers made no representations or warranties of any kind.
- the buyers were purchasing the properties as a result of their own examination in their "as-is" conditions.

Both contracts also contained typical "free look" or "inspection contingency" provisions. These allowed the buyers and their representatives access to the properties to investigate their condition.

The buyers retained engineering firms to inspect each of the buildings. The inspections did not reveal any substantial problems with the plumbing in either building. Approximately two years after the closings, however, the buyers learned that polybutylene pipe was pre-

sent at both properties. This pipe is a defective type of flexible tubing that fails and leaks when used to transport warm water under normal water pressures.

The sellers claimed they were not aware that the defective pipe has been used in the buildings. Despite this, the jury returned a verdict awarding the buyers \$3,690,000 in damages based on the buyers' claim of negligent nondisclosure of facts basic to the parties' transaction.

Failing to disclose

The court based its decision on Section 551 of the Restatement (Second) of Torts, which provides that:

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated ... facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a

disclosure of those facts.

The Restatement provides that one who fails to disclose such facts is subject to the same liability as though he had represented the nonexistence of the matter that he failed to disclose.

The sellers argued that they were unaware of the defective pipes. They also argued that even if they had actual knowledge of the condition, they were under no duty to disclose the defective plumbing to the buyers because of the as-is clauses shifted the burden of discovering the defect to the buyers. The buyers, on the other hand, argued that an as-is clause in a purchase contract operates only as a waiver of breach of warranty claims and not as a waiver of tort claims.

The court agreed with the buyers and held that latent defects in a property sold "as-is" that are known to the seller must be disclosed to the purchaser and that a cause of action for negligent nondisclosure is available when the purchaser is precluded by the seller from discovering facts basic to the transaction.

The court distinguished latent defects—those that are hidden or concealed and that could not be discovered by reasonable and customary observation or inspection—from patent defects—those that are plainly visible or which can be discovered by such an inspection as would be made in the exercise of ordinary care and prudence.

In arriving at its holding, the court cited the implied covenant of good faith and fair dealing, which Arizona courts have long found exists in every contract. The court said that to reach a different decisions "would allow ven-

dors to conceal latent problems with the property and 'hide behind contract language purporting to shift the risk of nondisclosure to the purchaser.' "

Preventing effective inspection

The court made clear that under Arizona law, the rule of *caveat emptor* continues to apply to an as-is sale even if facts basic to the transaction have not been disclosed, so long as those facts are patent or the purchaser has been given an appropriate opportunity to discover latent defects. However, the court noted that "preventing a party from conducting an inspection effectively turns what may be a patent defect into an undiscoverable-in-fact latent defect."

The court found that the jury's verdict could be upheld on that basis as well because the jury was free to conclude from the facts that the buyers did not have an "equal opportunity" to discover the defects because:

- The defective pipes were buried six inches inside the walls;
- The contracts precluded the buyers from damaging the property in the course of their inspections;
- The sellers' property manager would not allow the buyers to inspect inside the walls of the buildings;
- All visible plumbing was copper piping, not the defective piping.

The court also found that if sellers' property management company knew of the plumbing defect, that knowledge could be imputed to the sellers to satisfy the requirements for the sellers' nondisclosure liability.

Steps for the wary

What can sellers, the brokers and at-

torneys learn from this case?

- Before contracting to sell commercial property, sellers should check with their property managers, maintenance personnel and other insiders to determine if there are latent defects.
- Disclose to the buyer latent defects and facts basic to the transaction, whether patent or latent, that the seller might be found to have precluded the buyer from discovering.
- If there is any doubt as to whether a property defect is patent or latent, it may be advisable to disclose the defect to the buyer.
- In drafting as-is clauses, both contract and tort liability should be expressly disclaimed (although Arizona courts have indicated they will not enforce a disclaimer of the seller's fraudulent acts).
- In preparing and administering free look or inspection contingency clauses, the buyer should be given the right to examine all aspects and areas of the property, including those areas that ordinarily might be considered inaccessible (with appropriate repair and indemnity obligations from the buyer).

Thus, an as-is clause and inspection contingency may not serve as a safe harbor for sellers of commercial property. However, care in marketing properties together with well-drafted contracts, will continue to provide sellers with protection against liability for nondisclosure.

Andrew D. Schoor is a partner in the Tucson office of Lewis and Roca, L.L.P. in the firm's Real Estate Practice Group.

Court holds landlord making repairs is not a 'contractor'

by Dan Kloberdanz

A recent Arizona Court of Appeals decision held that a landlord who makes his own repairs with his own employees is not required to hold a contractor's license. *Levitan v. State of Arizona, Registrar of Contractors*, 33 P.3d 796 (Ariz. App. Nov. 13, 2001). In this new decision, the owner of two apartment complex filed a lawsuit against the Registrar of Contractors seeking a declaratory judgment from the court to determine whether an owner of rental property who performs repairs on his own properties is required to hold a contractor's license. At the trial court level, the Coconino County Superior Court Judge ruled in favor of the Registrar and held that a

landlord fell within the definition of a "contractor," and was thus required to have a contractor's license to perform work on his own properties. The Arizona Court of Appeals reversed the trial court and held the property owner was not required to hold a contractor's license because the landlord did not receive "compensation" for performing repairs on his own properties, which is part of the requirement for him to fall within the statutory definition of a "contractor."

Background of Case.

The landlord, Levitan, owned two apartment complexes in Flagstaff, and he desired to put a new roof on the smaller apartment complex and replace a

stained toilet at the other complex. Levitan, anticipating a problem with the Arizona Registrar of Contractors, filed a lawsuit against the Registrar seeking a declaratory judgment from the courts that he and his employees could perform the repairs without first obtaining a contractor's license because he was not a "contractor" within the meaning of A.R.S. § 32-1101 (A)(3).

The trial court ruled that Levitan fell within the definition of a contractor under § 32-1101(A)(3), and thus could not legally make the repairs to his own properties. The parties had stipulated in this lawsuit that Levitan did not qualify for a license exemption (if he was indeed a "contractor"), so the trial court

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Contractor

Continued from page 13

never addressed whether Levitan qualified for any of the contractor exemptions listed in A.R.S. § 32-1121.

Who Is A Contractor Under A.R.S. 32-1101(A)(3)?

The Court of Appeals addressed the sole issue whether Levitan qualified as a "contractor" within the meaning of the definitional statute, A.R.S. § 32-1101(A)(3). The applicable statute provides in pertinent part:

"Contractor" is synonymous with the term "builder" and means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that, for compensation, undertakes to or offers, to undertake to, purports to have the capacity to undertake to, submits a bid or responds to a request for qualification or a request for proposals for construction services to, does himself or by or through others, or directly or indirectly supervises others to:

(a) Construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or any other structure or work in connection with the construction.

The Registrar contended that Lev-

itan fell within this definition because he would be receiving "compensation" in the form of rent from tenants. The Court of Appeals disagreed, however, and noted the term "rent" means compensation for the use of real property and not for construction services, such as repairs. The court added Levitan was legally required to maintain the property. The Court of Appeals recognized that Levitan's obligation to repair and maintain his property derives from the Arizona Residential Landlord Tenant Act. Specifically, A.R.S. § 33-1324(A)(2) requires a landlord to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Thus, the court reasoned that the rent a landlord receives does not really "compensate" the landlord for repairs, alterations, or improvements to rental property.

The Registrar also argued that Levitan was a "contractor" because he admittedly failed to qualify under any of the exemptions listed in A.R.S. § 32-1121. The Court of Appeals stated the Registrar's construction of the exemption statute ignored the admonition in A.R.S. § 32-1101 (D) that "[o]nly contractors as defined in this section [A.R.S. § 32-1101 (A)(3)] are licensed and regulated by this chapter." The court held that A.R.S. § 32-1121 merely creates safe harbors for certain specific categories of persons, who do contracting work who would otherwise be required to be licensed. Thus, the court reasoned that looking to the definitional

statute for "contractor" (as quoted above in this article) has to be the first step in determining whether one is actually a contractor. If the person qualifies as a contractor, only then should the court consider if an exemption applies.

Because the court ruled in favor of the landlord, the court did not need to address another potential argument in favor of the landlord, and that is whether a landlord is a person who "undertakes" a repair under A.R.S. § 32-1101(A)(3). An argument could be made that the phrase "undertakes" does not apply to a person making repairs to his own property, but requires at least a two-party relationship.

Conclusion

The Court of Appeals correctly determined that the landlord did not receive "compensation" for repairs to his own property, and thus, did not need to hold a contractor's license. The Registrar's position would require all landlords to hire licensed contractors to make just about any repair on their own property. The Registrar's position could have even applied to persons other than landlords. If the Court of Appeals had upheld the trial court's decision, this case would have had a widespread and potentially devastating effect on landlords and property managers throughout Arizona.

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